INTERIOR BOARD OF INDIAN APPEALS

Victoria J. Pretty Paint v. Rocky Mountain Regional Director, Bureau of Indian Affairs

38 IBIA 177 (10/31/2002)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

VICTORIA J. PRETTY PAINT, Appellant	:	Order Vacating Decision and Remanding Case
v.	:	
ROCKY MOUNTAIN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	Docket No. IBIA 02-123-A October 31, 2002

Appellant Victoria J. Pretty Paint seeks review of an April 26, 2002, decision issued by the Rocky Mountain Regional Director, Bureau of Indian Affairs (Regional Director; BIA), declining to place a hold on the Individual Indian Money (IIM) account of John Smells for back child support payments. For the reasons discussed below, the Board of Indian Appeals (Board) vacates that decision, and remands this matter to the Regional Director for the issuance of a new decision.

On September 28, 2000, the Crow Tribal Court entered an order in Pretty Paint v. Smells, Civil Case No. 96-163, 96-187, finding that Smells owed back child support payments to Appellant. The court ordered the garnishment of Smells' salary from the Crow Tribe and of other income owed to him by the Tribe. It also ordered the payment to Appellant of one-half of Smells' income received from leases. It appears that some, if not all, of Smells' lease income was deposited into his IIM account.

Appellant sought to obtain payment of the back child support from Smells' IIM account. A January 18, 2001, letter from the Superintendent, Crow Agency, BIA (Superintendent), notified Smells that a hold had been placed on one-half of any lease income coming into his IIM account until the back child support had been paid. The letter further informed Smells of his right to request a hearing in regard to the hold. There is no evidence in the present administrative record that Smells officially objected to the hold.

The hold on Smells' IIM account was removed after a February 28, 2002, letter from the Superintendent to Appellant. The Superintendent stated that BIA policy prohibited paying back child support from an IIM account. In support of this statement, he cited a November 9, 2001, memorandum from the Deputy Commissioner of Indian Affairs. That memorandum states in pertinent part:

> When individuals make a decision to have a child, it is their responsibility to provide for the basic needs of the child. The BIA supports that parental responsibility. If the parent is not providing support for his/her child and that parent has some financial resources to provide for that child, it is important that the parent fulfills their responsibility. It is the BIA's policy that the IIM account may be used **as a last resort** to satisfy ongoing child support orders. The BIA **will not** honor any back child support awards from a parent's IIM account. This policy extends to state, tribal and federal child support orders.
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> The BIA will not honor back child support ordered claims against an IIM account. These claims include: * * * 2) orders issued that allow the custodial parent/guardian to collect child support that should have been paid previously by the parent (back child support awards). If an order is issued and that order awards both back child support amounts and ongoing child support, the BIA **may only consider** the order for the ongoing child support, i.e. the current amount. [1/]

Appellant appealed the February 28, 2002, decision to the Regional Director. On April 26, 2002, the Regional Director affirmed the Superintendent's decision. As had the Superintendent, the Regional Director cited the Deputy Commissioner's November 9, 2001, memorandum as the sole basis for his decision.

The Regional Director incorrectly advised Appellant that she could appeal his decision to the Assistant Secretary - Indian Affairs. Appellant's appeal to the Assistant Secretary was forwarded to the Board. By order dated June 17, 2002, the Board determined that the appeal was timely because Appellant had been given incorrect appeal information. Although advised of her right to do so, Appellant did not file an opening brief. Therefore, the Board considers the arguments set out in Appellant's notice of appeal. No other briefs were filed.

As background, funds in an IIM account are held in trust by the Department of the Interior for the account holder, to whom the Department owes a fiduciary obligation. See, e.g., Shoshone-Bannock Tribal Credit Program v. Portland Area Director, 35 IBIA 110, 120; recon. denied, 35 IBIA 159 (2000). 25 U.S.C. § 410 establishes the general rule that funds derived from trust property are not available for the payment of debts of, or claims against,

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1/ The memorandum does not explain the reasons for the prohibition against the payment of back child support awards.

the account holder. However, the section grants the Secretary of the Interior discretion to approve payments for debts or claims from trust funds. Section 410 provides:

> No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period * * * except with the approval and consent of the Secretary of the Interior.

Regulations implementing this statute as it applies to IIM accounts are found in 25 C.F.R. Part 115. A comprehensive revision of Part 115 took effect on March 23, 2001. See 66 Fed. Reg. 7068, 7094 (Jan. 22, 2001).

25 C.F.R. § 115.104 provides general authorization to pay judgments from an IIM account: "Funds of individuals may be applied by the Secretary or his authorized representative * * * against money judgments rendered by courts of Indian offenses or under any tribal law and order code." 25 C.F.R. § 115.601(b) provides: "The BIA may restrict your IIM account through an encumbrance if the BIA: (1) Receives an order from a court of competent jurisdiction awarding child support from your IIM account." "Court of competent jurisdiction" is defined in 25 C.F.R. § 115.002 as "a federal or tribal court with jurisdiction; however, if there is no tribal court with jurisdiction, then a state court with jurisdiction."

Under both the statute and the regulations, the decision as to whether disbursements should be made from an IIM account to pay judgments, including child support, is placed within the informed discretion of BIA. See, e.g., Jackson County, Oregon v. Phoenix Area Director, 31 IBIA 126, 131 (1997), and cases cited there; United States v. Acting Aberdeen Area Director, 9 IBIA 151 (1982). Payment of a judgment with funds in an IIM account, even though payment was ordered by a court of competent jurisdiction, is thus not mandatory.

Although Appellant raises several arguments in her notice of appeal, the Board finds one of those arguments dispositive here. Therefore, it addresses only that argument.

Appellant contends that the November 2001 memorandum is an internal document that "was never officially proposed or open for public comment" and that "[t]he directive is not entitled to any sort of *Chevron* deference." Notice of Appeal at 2. 2/ Appellant's argument is essentially that the memorandum is an impermissible attempt to amend a regulation without using the notice and comment procedures required by the Administrative Procedure Act, 5 U.S.C. § 553.

2/ Appellant is presumably referring to Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984), in which the United States Supreme Court deferred to an Executive Branch agency's (the Environmental Protection Agency) reasonable interpretation of a statute it was charged with enforcing.

The phrase "child support" is not defined in 25 C.F.R. § 115.002. It is not limited in 25 C.F.R. § 115.601(b)(1). Neither is any limitation suggested in the comment on this subject published in the Federal Register with the revision of Part 115:

> Finally, there were comments involving BIA's recognition of child support awards. Concerns included honoring excessive awards; limiting amounts awarded by a court of competent jurisdiction; and other comments stating that there should be no discretion to reduce the amount of a child support award to be paid from an IIM account. Consistent with federal policy, we believe that parents are responsible for providing support for their children and that child support awards are to be determined by courts of competent jurisdiction. If there is a dispute regarding a child support award and we are provided with notice of an appeal of a child support award, upon request we will postpone the hearing [in regard to the placing of a hold on an IIM account].

66 Fed. Reg. 7068, 7077-78.

Nothing in 25 C.F.R. Part 115 restricts the payment of back child support awards from an IIM account. However, the November 2001 memorandum seeks to impose an absolute prohibition against such payments.

The Board has discussed the persistent BIA practice of attempting to amend regulations through unpublished documents, particularly the Bureau of Indian Affairs Manual (BIAM), but also including internal policy memoranda. It has consistently held that pronouncements made in these unpublished documents are not regulations, do not have the force and effect of law, and cannot be applied against any party other than BIA (as their author). See, e.g., Village of Ruidoso, New Mexico v. Albuquerque Area Director, 32 IBIA 130, 134-38 (1998) (internal BIA guidelines found inapplicable to case, authority and effect not discussed; "checklist" setting out internal BIA procedures applied against BIA); Village of Ruidoso, New Mexico v. Albuquerque Area Director, 31 IBIA 143, 151 (1997) (new standard announced in BIA's brief to the Board not applied); Robles v. Sacramento Area Director, 23 IBIA 276, 278 (1993), and cases cited there (additional requirements set out in the BIAM not applied); Allen v. Navajo Area Director, 10 IBIA 146, 163-65 (1982) (eligibility standard published only in the BIAM not applied). See also Morton v. Ruiz, 415 U.S. 199, 232-35 (1974). 3/ Because they are unpublished, many, if not most, of these documents are not available to the public.

3/ In Ruiz, the Supreme Court held that the BIAM is "solely an internal-operations brochure" (415 U.S. at 235), which does not "let the standard [of eligibility] be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries." 415 U.S. at 231.

The Board again disapproves the use of an unpublished internal policy memorandum as a method of amending a regulation. If BIA wishes to amend 25 C.F.R. § 115.601(b)(1) as set out in the November 2001 memorandum, it must do so through an appropriate rulemaking proceeding, or through some other method recognized as acceptable public notice by the Administrative Procedure Act.

Because the Regional Director's decision was based solely on the November 2001 memorandum, that decision must be vacated.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's April 26, 2002, decision is vacated, and this matter is remanded to him for a decision that does not rely solely on the November 2001 memorandum. 4/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge

4/ It is conceivable that, had BIA filed a brief in this case, it might have argued that the Nov. 2001 memorandum constitutes a limitation on the discretionary authority delegated to subordinate BIA officials. Even if the Board were to accept such an argument (which it does not because the argument was not made), the memorandum contains no reasoning in support of the absolute prohibition against the payment of awards of back child support from an IIM account. Under these circumstances, BIA cannot show that the prohibition is not arbitrary, capricious, or an abuse of discretion.